No. 06-856

IN THE

Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND

DEWOLFF, BOBERG & ASSOCIATES, INC. EMPLOYEES' SAVINGS PLAN,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. Many of these plans are "401(k) plans" that allow eligible employees to elect whether to participate, how much to contribute, and how their accounts should be allocated among the plan's investment options.

ERIC frequently participates as *amicus curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2] This is such a case.

Petitioner has illegitimately recast a claim for plan benefits as a claim for breach of fiduciary duty. A participant in an employee benefit plan is permitted to file a civil action to enforce a benefits claim under § 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"):

> A civil action may be brought – (1) by a participant or beneficiary – ... (B) to recover benefits due to him under the

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See, e.g., General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987).

> terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a). Because petitioner seeks "to recover benefits due to him under the terms of his plan," "to enforce his rights under the terms of the plan," and "to clarify his rights to future benefits under the terms of the plan," his claim falls within the scope of § 502(a)(1)(B).

Many plan participants and beneficiaries, with claims similar or analogous to petitioner's claim, have filed civil actions under § 502(a)(1)(B) to enforce their claims. Where a claimant has established that he or she has not received the benefits or been afforded the rights to which the claimant was entitled under the terms of the plan, courts have awarded relief, including monetary relief, to make up for the plan's failure to provide the benefits or rights to which the claimant was entitled under the terms of the plan.

This reality belies any claim that an amendment to ERISA is needed to authorize courts to grant the kind of relief petitioner that seeks here. Such relief would have been available if petitioner had proven his case under § 502(a)(1)(B). Petitioner's decision to embark on a different path – *not* the path charted by Congress in ERISA and followed by countless individuals – does not alter what § 502(a)(1)(B) provides.

Moreover, if petitioner's new path is available to participants and beneficiaries with claims for benefits under the terms of a plan, those individuals can easily circumvent the procedures that ERISA prescribes for benefit claims simply by recasting their benefit claims as fiduciary breach claims. This will cause employee benefit litigation and litigation costs to escalate even more than they already have.

Additional litigation over benefit claims arising under employee benefit plans would harm employers and employees by discouraging the formation of new plans, encouraging the termination of existing plans and, for the plans that remain, requiring the allocation of a greater percentage of plan resources to legal fees and costs rather than to providing benefits.

Because of the importance of the issues presented by this case, ERIC respectfully urges the Court to affirm the decision below and make clear that a plan participant cannot file an action to recover benefits under § 502(a)(2) or (3) of ERISA merely by recasting a benefit claim as a fiduciary breach claim.

STATEMENT

Petitioner participated in an ERISA-governed 401(k) plan (the "DeWolff Plan" or the "Plan") sponsored by his employer, DeWolff, Boberg & Associates, Inc. ("DeWolff"). The Plan designated DeWolff as the administrator of the Plan (the "Administrator").[3]

The Plan allowed each eligible employee to elect to forgo receiving a percentage of compensation and to have an amount equal to the forgone compensation contributed to the Plan for the employee's benefit. In addition, the Plan stated that each year DeWolff would make a "qualified non-elective contribution" equal to a percentage of compensation to be determined by DeWolff and might also make a discretionary profit-sharing contribution. Br. in Opp. App. 10a, 12a-18a.

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[3] Although petitioner's complaint stated that the Plan document was attached to his complaint, only a copy of the summary plan description ("SPD") was attached. *See* Br. in Opp. App. 2a, 6a-42a. For purposes of ruling on respondents' motion for judgment on the pleadings, the courts below accepted petitioner's allegations as pled. Pet. App. 2a-3a, 15a-16a. Accordingly, this description of the Plan is based solely on the allegations in the complaint and the SPD.

The Plan provided that each participant's benefits would be based on the participant's vested interest in the balance in an account maintained for the participant, that amounts equal to the contributions made by or for each participant would be added to that account, and that the participant's account balance would be adjusted to reflect the investment returns on the amounts attributable to those contributions. Br. in Opp. App. 13a, 14a, 17a, 19a. The Plan provided that a participant's interest in the portion of the account attributable to DeWolff's profit-sharing contributions would vest on a graduated schedule. Br. in Opp. App. 21a.

The Plan stated that each participant could direct the investment of the participant's interest in the Plan, that the Administrator would inform the participant of the available investment choices, the frequency with which a participant could change investments, and other matters. The Plan also stated that to the extent that the participant did not direct investments, the Trustee or another designated person would be responsible for making investment decisions. Br. in Opp. App. 19a.

The Plan included a benefit claim procedure that allowed a participant to submit a claim for benefits under the Plan. The Plan stated that if a claim for benefits was denied in whole or in part, the Administrator would explain the reasons for the denial in writing, and that if the participant wanted the denial of a claim to be reviewed, the participant had to submit a written request for review to the Administrator within 60 days after the claim was denied. The Plan provided that if the claim was denied upon review, the participant could file suit in state or federal court. Br. in Opp. App. 37a-40a.

Without exercising his rights under the Plan's benefit claim procedure, petitioner filed a complaint against DeWolff and the Plan on June 2, 2004, in the U.S. District Court for the District of South Carolina. He alleged that, in 2001 and 2002, he directed that "his

money" be invested in a certain way, but that the Plan did not follow his direction, and that as a result his interest in the Plan was depleted by about $150,000. He alleged that DeWolff was a Plan fiduciary responsible for the Plan's operations and that it had breached its fiduciary duties under § 404 of ERISA. Petitioner asked the court to grant him "make whole" or other equitable relief under § 502(a)(3) of ERISA. Br. in Opp. App. 1a-4a.[4]

Petitioner did not allege that the persons responsible for investing Plan assets had breached ERISA's fiduciary duties in any way other than by failing to invest "his money" in accordance with his directions. He did not allege that the fiduciaries had made misrepresentations to Plan participants or otherwise acted disloyally, that Plan assets had been invested imprudently, that the Plan's investments had not been diversified, that the fiduciaries had engaged in self-dealing or directed transactions that ERISA prohibits, or that the Plan's investments violated any provision of the Plan other than the participant-direction requirement. *See* ERISA §§ 404-408, 29 U.S.C. §§ 1104-1108. Petitioner asked the district court to grant "make whole" relief to *him*, rather than to the Plan or to other Plan participants. Br. in Opp. App. 1a-4a.

The district court granted respondents' motion for judgment on the pleadings and dismissed the case on the ground that § 502(a)(3) did not authorize the relief petitioner seeks. The Court of Appeals for the Fourth Circuit affirmed the district court's decision on the ground that neither § 502(a)(2) nor § 502(a)(3) authorizes such relief.

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[4] During proceedings in the court of appeals, petitioner also asserted that he was entitled to relief under § 502(a)(2).

SUMMARY OF ARGUMENT

Although the questions presented in this case refer to ERISA's second and third civil enforcement provisions (ERISA § 502(a)(2) & (3), 29 U.S.C. § 1132(a)(2) & (3)), the scope of the second and third provisions depends on the scope of the first civil enforcement provision, ERISA § 502(a)(1), 29 U.S.C. § 1132(a)(1). Section 502(a)(1) authorizes a plan participant or beneficiary to bring a civil action to "recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Section 502(a)(1) "was specifically enacted by Congress to permit the recovery of plan benefits by a participant or beneficiary." Pet. Br. at 25 n.17. Petitioner chose not to make a claim under § 502(a)(1), however, and instead based his claim entirely on § 502(a)(2) and (3). Petitioner has not explained why he did not make a claim under § 502(a)(1). He has asserted only that § 502(a)(1) "is not involved in this case." Pet. at 5 n.11.

Contrary to petitioner's assertion, § 502(a)(1) *is* involved in this case. Section 502(a)(1) authorizes a participant to bring an action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. That is precisely what petitioner seeks: to recover benefits he believes are due to him under the terms of the Plan, to enforce his rights under the terms of the Plan, and to clarify his rights to future benefits under the terms of the Plan. An amendment to ERISA is thus not needed to authorize the kind of relief that petitioner seeks here.

Petitioner claims that, contrary to the terms of the Plan, the Plan did not base the amount of his benefit on the performance of the investments he specified in his investment directions. His complaint recognizes that the

terms of the Plan gave him the right to issue such directions. ERISA did not give him that right. Petitioner does not allege that the Plan's fiduciaries violated their fiduciary duties regarding the investment of the Plan's assets in any way other than by failing to follow his directions. His complaint addresses neither the prudence of the fiduciaries' decision-making process nor the prudence of their investment decisions. He does not allege that the fiduciaries made misrepresentations regarding the Plan's terms. Petitioner seeks relief only for himself. He does not seek relief either for other participants or for the Plan as an entity. In fact, he named the Plan as a *defendant*.

Section 502(a)(2) and (3) offer relief only if relief under those provisions is "appropriate." The Court has emphasized that because § 502(a)(3) authorizes only "appropriate" relief, § 502(a)(3) does not normally provide relief if another provision of ERISA, such as § 502(a)(1), provides an adequate remedy. *Varity Corp* v. *Howe*, 516 U.S. 489, 515 (1996). Likewise, because § 502(a)(2) authorizes only "appropriate" relief, and provides relief only to the plan itself, § 502(a)(2) does not apply to benefit claims that fall within the scope of § 502(a)(1). The courts long ago concluded that participants cannot circumvent § 502(a)(1) by recasting benefit claims as fiduciary breach claims.

If plan participants were allowed to recast benefit claims as fiduciary breach claims, participants could easily circumvent the claim procedures, the exhaustion requirement, and the abuse of discretion standard of review that apply to most benefit claims under ERISA.

ERISA's benefit claim and exhaustion requirements foster efficient and nonadversarial dispute resolution and consistent decision-making by experienced and knowledgeable plan administrators. They reduce the need for litigation and develop a record that a court can review in the event there is litigation. The abuse of discretion

standard of review assures the employer that a benefit plan will be administered consistently and in accordance with the employer's purpose in establishing the plan.

There is a high risk of serious damage to employee benefit plans, employees, and their families if benefits claimants are allowed to opt out of the benefit claim procedure, the exhaustion requirement, and the abuse of discretion standard of review. Plans will suffer financially under the burden of mounting litigation costs – necessitating reductions in benefits, increases in required employee contributions, or both, and employer interest in sponsoring employee benefit plans will decline.

ARGUMENT

I. ERISA's Interlocking, Interrelated And Interdependent Remedial Provisions Encourage Employers To Establish Employee Benefit Plans And Require Such Plans To Establish Prompt, Fair, And Effective Benefit Claim Procedures.

In enacting ERISA, Congress sought to encourage employers to maintain employee benefit plans and to ensure that plan participants would receive the benefits that their plans were intended to provide. ERISA's remedial provisions in particular were designed to ensure that benefit commitments expressed in the terms of employee benefit plans would be honored, but to avoid imposing obligations that would discourage employers from adopting such plans. *See Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985).

Voluntary Regime. ERISA was designed to encourage and protect "the establishment, operation, and administration" of employee benefit plans by setting "minimum standards . . . assuring the equitable character of such plans and their financial soundness." ERISA § 2(a), 29 U.S.C. § 1001(a). ERISA does not require

employers to establish employee benefit plans, nor does it specify the benefits that such plans must provide. *See Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) ("[P]rivate parties, not the Government, control the level of benefits.").

Flexibility. Recognizing that the freedom to adopt and design their own pension plans was "vital" to the willingness of employers to provide such plans, Congress preserved "flexibility in the design and operation of . . . pension programs." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647. ERISA imposes "outer bounds" on permissible pension practices, but it does not "impos[e] mandatory pension levels or methods for calculating benefits." *Alessi*, 451 U.S. at 512.

Documentation. ERISA requires each benefit plan to be maintained pursuant to a written instrument that, among other things, "specif[ies] the basis on which payments are made to and from the plan" and requires the plan administrator to make the plan's written instrument available for examination and to distribute a summary of the plan as well. ERISA § 401(a) & (b)(4), 29 U.S.C. § 1101(a) & (b)(4); *see* ERISA §§ 101(a), 102(a), 104(b)(1), (2) & (4), 29 U.S.C. §§ 1021(a), 1022(a), 1024(b)(1), (2) & (4). Compliance with these requirements enables participants to learn what benefits their plans provide and how to obtain them. The plan documents also provide guidance to plan administrators. *See Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 82 (1995).

Interlocking, Interrelated Remedy Provisions. ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." *Russell*, 473 U.S. at 147 (citation omitted) (internal quotation marks omitted). Set forth in ERISA § 502(a), 29 U.S.C. § 1132(a), this integrated enforcement scheme is essential to accomplish Congress's purpose of

comprehensively regulating employee benefit plans. The Court has recognized

> one example of . . . overpowering federal policy in [ERISA's] civil enforcement provisions. 29 U.S.C. § 1132(a), authorizing civil actions for six [now nine] specific types of relief. In [*Russell*, 473 U.S. at 147], we said that these provisions amounted to "an interlocking, interrelated, and interdependent remedial scheme," which *Pilot Life* [*Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)] described as "represent[ing] a careful balancing of the need for prompt and fair settlement procedures against the public interest in encouraging the formation of employee benefit plans."

Rush Prudential HMO, Inc. v. *Moran*, 536 U.S. 355, 376 (2002).

Procedural Safeguards. ERISA requires each plan to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." ERISA § 503(2), 29 U.S.C. § 1133(2). The Labor Department regulation implementing § 503 strives to reconcile "the need for procedural protections with the purely voluntary nature of the system through which these vital benefits are delivered." 65 Fed. Reg. 70,246, 70,246 (Nov. 21, 2000). The regulation requires a designated plan fiduciary to review benefit claims and safeguards to ensure that benefit claims are resolved promptly, fairly, consistently, and in accordance with the terms and objectives of the plan, without imposing excessive costs on the plan, the plan's participants and beneficiaries, and the sponsoring employer. *Id.* at 70,246, 70,250, 70,253, 70,256-57; 29 C.F.R. § 2560.503-1 (2007). ERISA's benefit claim procedures have been very

successful in resolving the vast majority of benefit claims without litigation. 65 Fed. Reg. at 70,263, tbl. 4, ll. 1-6.

II. Participants In A Defined Contribution Plan May Direct Plan Investments Only If The Terms Of The Plan Permit Them To Do So.

Defined Contribution Plans. ERISA recognizes two basic types of retirement plans: "defined contribution plans" and "defined benefit plans." ERISA §§ 3(34)-(35), 29 U.S.C. §§ 1002(34)-(35); *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

The DeWolff Plan was a defined contribution plan. Under a defined contribution plan, each participant's benefit is based solely on the balance recorded in a bookkeeping account that the plan maintains for that participant. The participant's account balance is based on (1) the amount of any employer and employee contributions that are allocated to the account, (2) the amount of any changes in the value of the plan's investments (*i.e.*, income, expenses, gains, and losses) to which the participant's account balance is allocated, and (3) any amounts forfeited by other participants and reallocated to the participant's account. ERISA, § 3(34), 29 U.S.C. § 1002(34). A participant's account balance thus reflects any decline in the total value of the investments to which the participant's account balance is allocated. *See Montgomery* v. *United States*, 18 F.3d 500, 501-02 (7th Cir. 1994).[5]

Managing Plan Assets. Typically, all of the assets of a defined contribution plan are held in a single trust, and the trustee is the legal owner of the plan's assets. Participants' account balances are bookkeeping entries

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[5] ERISA classifies all retirement plans other than defined contribution plans as defined benefit plans. *See* ERISA § 3(35), 29 U.S.C. § 1002(35).

that reflect the participants' beneficial interests in the trust, rather than ownership interests in trust assets.

Participant-Directed Plans. Many defined contribution plans allow individual participants to allocate their account balances to one or more investments that are listed on a menu of investment options that the plan presents. (Some plans give participants the right to designate investments that are not listed on the menu.) Under such plans, the plan's investment experience does not affect all participants' benefits uniformly. The effect of an investment's performance on a participant's account balance depends on the participant's investment allocation decisions. *See, e.g., Jenkins* v. *Yager*, 444 F.3d 916, 919-23 (7th Cir. 2006).

ERISA does not require a defined contribution plan to give participants the right to direct the allocation of their accounts. In general, ERISA provides that the plan's trustee is responsible for managing the plan's assets except to the extent that the plan provides that the trustee is subject to the direction of an investment manager or a named fiduciary. ERISA §§ 402(a) & (c), 403(a), 29 U.S.C. §§ 1102(a) & (c), 1103(a). The party responsible for managing the assets is required to do so in accordance with ERISA's standards of fiduciary responsibility, including the duty of loyalty, the duty of prudence, and the obligation to avoid violations of ERISA's prohibited transaction provisions. ERISA §§ 3(21)(A), 404-408, 29 U.S.C. §§ 1002(21)(A), 1104-08; *see Jenkins*, 444 F.3d at 923-24.

Any rights that participants have to allocate their account balances among investments are conferred by the terms of the plan, not by ERISA. *See id.* at 923-24.[6]

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[6] The Pension Protection Act of 2006 amended ERISA to provide that, beginning in 2007, certain defined contribution plans that invest in employer securities must allow certain participants to direct the plan to divest any employer securities allocated to their accounts and to

Although § 404(c) of ERISA, 29 U.S.C. § 1104(c), can limit fiduciary liability under a participant-directed plan, § 404(c) does not give plan participants the right to issue investment directions. Section 404(c) provides only that if certain conditions are met, the participant's exercise of investment control will not cause the participant to be treated as a fiduciary, and no person who is otherwise a fiduciary will be liable for any loss, or by reason of any breach, caused by the participant's exercise of investment control. One of those conditions is that, "*[u]nder the terms of the plan*, the participant has a reasonable opportunity to give investment instructions . . . to an identified plan fiduciary who is obligated to comply with such instructions." 29 C.F.R. § 2550.404c-1(b)(2)(A) (2007) (emphasis added); *see id.* § 2550.404c-1(a)(2); 57 Fed. Reg. 46,906, 46,907 (Oct. 13, 1992).

III. Because Petitioner Could Have Brought This Suit Under § 502(a)(1)(B), He Is Not Entitled To Bring It Under § 502(a)(2) Or (3).

A. A Participant May Sue Under § 502(a)(2) Or (3) Only For Appropriate Relief For Injuries That Are Not Adequately Remedied By Other ERISA Provisions.

In *Varity*, 516 U.S. at 512, the Court observed that § 502(a)(3) is a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." The Court emphasized:

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reinvest the proceeds in another investment. Pub. L. No. 109-280, § 901(b) & (c), 120 Stat. 780, 782 (2006), creating ERISA § 204(j), 29 U.S.C. § 1054(j). There is no suggestion in the record that the DeWolff Plan invested in employer securities. In any event, this case concerns events alleged to have occurred in 2001 and 2002, before ERISA § 204(j) became effective.

> [T]he statute authorizes "*appropriate*" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others." Thus, we should expect that *where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."*

Id. at 515 (emphasis added) (citations omitted).

Consistent with *Varity*, the circuit courts have uniformly held that a participant may not assert a claim under § 502(a)(3) when the participant can obtain adequate relief by asserting a claim for benefits under § 502(a)(1)(B). *See, e.g.*, *LaRocca* v. *Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) ("[F]ederal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section [502(a)(1)], there is an adequate remedy under the plan which bars a further remedy under Section [502(a)(3)]."). [7]

Section 502(a)(2) provides for "*appropriate* relief" under § 409 – just as § 502(a)(3) provides for "*appropriate* equitable relief." There are good reasons to believe that Congress intended "appropriate" to have the same

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[7] *See also Johnson* v. *Buckley*, 356 F.3d 1067, 1077-78 (9th Cir. 2004) (§ 502(a)(3) claim is not appropriate where plaintiff can assert a § 502(a)(1)(B) claim); *Rhorer* v. *Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999) (same); *Wald* v. *Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (same).

meaning in both § 502(a)(2) and § 502(a)(3). The two provisions are in adjacent paragraphs of the same subsection of the same statute. *See Barnhill* v. *Johnson*, 503 U.S. 393, 406 (1992) ("Normally, we assume that the same terms have the same meaning in different sections of the same statute."). Thus, Congress presumably intended "appropriate relief" in § 502(a)(2) to have the same meaning as "appropriate . . . relief" in § 502(a)(3).

More importantly, in addressing the type of relief that would normally not be "appropriate" under § 502(a)(3), the Court in *Varity* referred to the views expressed in *Russell* regarding the relief available under § 502(a)(2). *Russell* stated that § 502(a)(1)(B) – rather than § 502(a)(2) – authorizes individual beneficiaries to enforce their rights under the plan, that § 502(a)(2) is concerned with providing relief to the plan itself, and that the Court was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 144, 147.

Consistent with *Varity* and *Russell*, the lower courts have repeatedly held that benefit claim actions must be brought under § 502(a)(1)(B) and cannot be brought under § 502(a)(2) by recasting or repackaging the benefit claim as a fiduciary breach claim; otherwise, any benefit claim could be recast as a fiduciary breach claim and enforced under § 502(a)(2). *See, e.g., Drinkwater* v. *Metropolitan Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988) (stating that plaintiff's claim is a benefit claim "artfully dressed in statutory clothing" and that if claimants were allowed to play the "characterization game, then the exhaustion requirement would be rendered meaningless"); *Coyne & Delaney Co.* v. *Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 714 (4th Cir. 1996) ("To permit" a suit seeking medical benefits "to proceed as a breach of fiduciary duty action would encourage parties to avoid the implications of section 502(a)(1)(B) by artful pleading; indeed every wrongful denial of benefits could be characterized as a breach of

fiduciary duty under [this] theory."); *Crummett* v. *Metropolitan Life Ins. Co.*, No. 06-01450(HHK), 2007 U.S. Dist. LEXIS 50956, at *4-*9 (D.D.C. July 16, 2007) (citing cases); John H. Langbein et al., Pension and Employee Benefit Law 756 (4th ed. 2006) ("Plaintiffs sometimes try to recast benefit denial claims as fiduciary claims in order to avoid exhaustion, and courts have been vigilant in not allowing such artful pleading.").

In *Smith* v. *Sydnor*, 184 F.3d 356 (4th Cir. 1999), the Fourth Circuit emphasized that claims based on the terms of *the plan* are subject to § 502(a)(1)(B), while claims based on the terms of *ERISA* are not:

> *Simmons* [v. *Willcox*, 911 F.2d 1077, 1081 (5th Cir. 1990)], *Drinkwater*, and *Coyne & Delaney* instruct us that a claim for breach of fiduciary duty is actually a claim for benefits where the resolution of the claim turns on an interpretation and application of *an ERISA-regulated plan* rather than upon an interpretation and application of *ERISA*.

Sydnor, 184 F.3d at 362-63.

Here, petitioner alleges a loss of benefits based on a claim that turns on the application and interpretation of the terms of the Plan, rather than ERISA. He claims that, contrary to the Plan's terms, the amount of his benefit under the Plan was not based on the performance of the investments he specified in the directions he gave in accordance with the Plan's terms. His complaint addresses neither the prudence of the Plan fiduciaries' investment decision-making process nor whether their investment decisions were prudent. It focuses solely on how his benefit under the Plan was determined. Petitioner's complaint thus makes a claim for Plan-based benefits that is actionable *solely* under § 502(a)(1)(B).

If plan participants could recast benefit claims as fiduciary breach claims, they could easily circumvent the procedures that Congress designed for benefit claims and thereby undermine Congress's efforts in ERISA to encourage employers to sponsor employee benefit plans and to ensure that participants receive the benefits that the plan is intended to provide.

Dicta in two circuit court decisions can be read to suggest that where a participant in a defined contribution plan alleges fiduciary mismanagement of plan assets, the participant can sue for relief under both § 502(a)(1)(B) and § 502(a)(2). *See Graden* v. *Conexant Sys. Inc.*, No. 06-2337, 2007 U.S. App. LEXIS 18179, at *8-9 (3d Cir. July 31, 2007); *Harzewski* v. *Guidant Corp.*, 489 F.3d 799, 804-07 (7th Cir. 2007). The opinions in these cases suggest that the terms of the plan should be deemed to incorporate ERISA and that therefore a suit alleging breach of fiduciary duty can be brought under § 502(a)(1)(B). In neither case, however, did the plaintiffs sue under § 502(a)(1)(B), and neither court decided that plaintiffs could do so. In any event, that issue is not presented by this case, and the Court need not address it.

If the Court were to address this issue, however, it should reject the view that ERISA can be regarded as one of the terms of a plan for purposes of § 502(a)(1)(B). Treating ERISA as a term of the plan would be inconsistent with the distinctions that Congress carefully drew in the text of § 502(a), which refers to "the terms of the plan" in § 502(a)(1)(B), but to "this title" (Title I of ERISA) in § 502(a)(3) and § 502(a)(5) and to "section 409" in § 502(a)(2).

Moreover, treating ERISA as a term of the plan would be inconsistent with Congress's objective of giving federal courts *exclusive jurisdiction* over the construction and application of ERISA. ERISA vests state and federal courts with concurrent jurisdiction only over § 502(a)(1)(B) and § 502(a)(7) suits (relating to the terms

of the plan and state actions to enforce medical child support orders). *See* ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1); H.R. Conf. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107. If ERISA were treated as a term of a plan, state courts would, by reason of § 502(a)(1)(B), have concurrent jurisdiction to decide statutory ERISA issues rather than merely to interpret and enforce plan terms – contrary to Congress's intent.

B. A Participant May Sue Under § 502(a)(1)(B) For Individualized Relief Regarding The Participant's Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan.

In *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004), this Court summarized § 502(a)(1)(B) as follows:

> This provision is relatively straightforward. If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under a de novo review standard, unless the terms of the plan "giv[e] the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Id. at 210 (citations omitted).

The Court has addressed the scope of § 502(a)(1)(B) on several occasions.

In *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), the Court ruled that ERISA § 514 preempted a state common-law action for improper processing of a claim for disability benefits on the ground that the state law related to an employee benefit plan.

In *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58 (1987), the Court held that a state common-law claim alleging an improper denial of medical care coverage to which the plaintiff was entitled *solely* because of the terms of an ERISA-regulated benefit plan was automatically converted into a federal claim. *Id.* at 65-68. The Court explained that "causes of action *within the scope of* the civil enforcement provisions of 502(a) [are] removable to federal court." *Id.* at 65-66 (emphasis added).

In both *Pilot Life* and *Taylor*, the Court concluded that the state-law claims fell *within the scope of* § 502(a)(1)(B) and therefore were preempted because the asserted state-law claims required the plaintiffs to show, at a minimum, that they were entitled to the benefits in question under the terms of their ERISA-governed plans.

More recently, relying on *Taylor* and *Pilot Life*, the Court ruled in *Aetna Health* that § 502(a) preempted state-law causes of action that fell "*within the scope of* § 502(a)(1)(B)":

> [I]f an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated then

> the suit falls within the scope of ERISA § 502(a)(1)(B).

Aetna Health, 542 U.S. at 210 (internal quotation marks omitted).

Taylor, *Pilot Life*, and *Aetna Health* establish that a claim falls "within the scope of § 502(a)(1)(B)" if the claim seeks to remedy what the claimant regards as a wrongful denial of benefits offered by an ERISA-regulated plan, *i.e.*, to vindicate the claimant's right to present or future benefits under the terms of the plan, rather than to vindicate a right that is independent of the terms of the plan, such as a right under ERISA or any other statute. Here, because petitioner's complaint seeks to vindicate his right to benefits under the terms of the Plan, his claim falls "within the scope of § 502(a)(1)(B)."[8]

C. Because Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan, He Could Have Sued Under § 502(a)(1)(B).

Section 502(a)(1)(B) addresses Congress's primary concern regarding individual plan participants and beneficiaries: that they receive the benefits and rights to which they are entitled under their plans. To this end,

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[8] Consistent with the text of § 502(a)(1)(B) and *Pilot Life*, *Taylor*, and *Aetna Health*, courts have held that § 502(a)(1)(B) provides a cause of action *only* for benefits due under the terms of the plan, and not for ERISA statutory claims. *See, e.g.*, *Todisco* v. *Verizon Commc'ns, Inc.*, No. 06-1957, 2007 U.S. App. LEXIS 18621 (1st Cir. Aug. 6, 2007); *Ross* v. *Rail Car Am. Group Disability, Inc. Plan*, 285 F.3d 735, 740, 742 (8th Cir. 2002); *Carrabba* v. *Randalls Food Mkts.*, 252 F.3d 721 (5th Cir. 2001), *aff'g* 145 F. Supp. 2d 763 (N.D. Tex. 2000); *Haberern* v. *Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1500-01 (3d Cir. 1994).

§ 502(a)(1)(B) makes available a variety of remedies, including declaratory judgment, injunctions and monetary relief. *See Russell*, 473 U.S. at 147; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989).

1. Petitioner Seeks Individualized Relief.

Petitioner seeks relief only for himself. His complaint asks the court to award "make whole relief" to "Plaintiff." He does not seek relief for other participants or for the Plan itself. In fact, the Plan is one of the *defendants* that petitioner sued. The complaint refers to the Plan's failure to follow petitioner's directions regarding the investment of "his money," but it neither asserts that other participants had been treated in the same way nor claims that the Plan is an intended beneficiary of the suit in which the Plan is a defendant.[9]

The relief that petitioner seeks is the amount by which, he alleges, the value of his interest in the Plan has been depleted, not the amount of a loss that the Plan has incurred. The complaint does not even allege that the Plan has incurred a loss. *See Matassarin* v. *Lynch*, 174 F.3d 549, 566 (5th Cir. 1999) (no cause of action under § 502(a)(2) unless a loss to the plan).[10]

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[9] *See Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146-47 (1985) ("To recover the benefits due her, she could have filed an action pursuant to § 502(a)(1)(B). . . . If the plan administrator's refusal to pay contractually authorized benefits had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary pursuant to §§ 502(a)(2) and 409.").

[10] The complaint named only DeWolff and the Plan as defendants and did not allege facts sufficient to establish that the alleged failure to follow petitioner's directions was caused by a fiduciary's breach of fiduciary duty rather than by a clerical error. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (person is a fiduciary only "to the extent" performing or responsible for performing fiduciary functions); 29

2. Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights.

Petitioner seeks relief relating to both his current and future benefits *and* his current and future rights. He requests relief directly related to the amount of his benefit under the Plan: the balance in his account. Petitioner alleges that the Plan's failure to follow his investment directions caused his account balance to be depleted by approximately $150,000. Petitioner thus seeks relief relating to both his current and future benefits and his current and future rights to give investment directions.[11]

3. Petitioner Seeks Individualized Relief Regarding His Current Or Future Benefits Or Rights Under The Terms Of An Employee Benefit Plan.

The basis for petitioner's complaint is that the Plan's failure to follow his directions regarding the investments allocable to his account reduced the size of his account

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C.F.R. § 2509.75-8, D-2 (clerical functions are not fiduciary functions) (2007); *Pegram* v. *Herdrich*, 530 U.S. 211, 225-26 (2000) ("threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action"); *Beddall* v. *State St. Bank & Trust Co.*, 137 F.3d 12, 18-21 (1st Cir. 1998) (mechanical administrative responsibilities are not fiduciary responsibilities).

[11] Investments allocable to a participant's account and a participant's right to direct such investments are treated as plan benefits for purposes of applying § 401(a)(4) of the Internal Revenue Code, which provides that a tax-qualified plan may not provide discriminatory benefits. *See, e.g.*, Treas. Reg. § 1.401(a)(4)-1(a), -1(b)(3), -4(a), -4(b), -4(c), -4(e)(3)(iii)(B); Rev. Rul. 93-87, 1993-2 C.B. 125, *superseding* Rev. Rul. 73-383, 1973-2 C.B. 137, Rev. Rul. 71-93, 1971-1 C.B. 122, *and* Rev. Rul. 70-370, 1970-2 C.B. 84 (rules in effect when ERISA was enacted).

balance, which determined the size of his benefit under the Plan. Because ERISA does not give participants the right to direct investments, the relief that petitioner seeks is necessarily based on the terms of the Plan.

4. Section 502(a)(1)(B) Authorizes The Relief Petitioner Seeks.

Many participants and beneficiaries in other plans, with claims similar or analogous to petitioner's claim, have filed civil actions under § 502(a)(1)(B) to enforce their claims. Where a claimant has established that he or she has not received the benefits or been afforded the rights to which the claimant was entitled under the terms of the plan, courts have ordered relief, including monetary relief, to make up for the plan's failure to provide the benefits or rights to which the claimant was entitled under the terms of the plan.

Illustrative claims for which relief has been sought under § 502(a)(1)(B) are listed below. The claimants obtained the relief they sought in some cases, but not in others. This is because the courts did not consider every claim to be meritorious, rather than because relief under § 502(a)(1)(B) was unavailable. *See generally Aetna Health*, 542 U.S. at 210-11 ("Upon the denial of benefits, respondents could have paid for the treatment themselves and then sought a reimbursement through a § 502(a)(1)(B) action. . . .").

- Alleged failure to implement investment directions in accordance with the terms of the plan: *Hess* v. *Reg-Ellen Mach. Tool Corp.*, 423 F. 3d 653, 657 (7th Cir. 2005); *Babcock* v. *Computer Assocs. Int'l, Inc.*, 186 F. Supp. 2d 253, 261 (E.D.N.Y. 2002).

- Alleged failure to make rollover from 401(k) plan to IRA on the date required by the plan: *Saylor* v. *Ret. Comm.*, No. 4:05CV138, 2007 U.S. Dist. LEXIS 54399 (E.D. Ark. July 25, 2007).

- Failure to allow employees allegedly eligible employees to participate in defined contribution plan: *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997); *Krackow* v. *Dr. Jack Kern Profit Sharing Plan*, No. 00 CV 2550 (NG) (RLM), 2002 U.S. Dist. LEXIS 20524, at *11 (E.D.N.Y. May 29, 2002).

- Alleged failure to value benefits on the date specified by the plan: *Janeiro* v. *Urological Surgery Prof'l Ass'n*, 457 F.3d 130, 136-37, 142-43 (1st Cir. 2006); *Nelson* v. *EG&G Energy Measurements Group, Inc.*, 37 F.3d 1384 (9th Cir. 1994).

- Alleged failure to distribute benefits on the date specified by the plan: *Dobson* v. *Hartford Fin. Servs. Group, Inc.*, 389 F.3d 386, 396-400 (2d Cir. 2004); *Rego* v. *Westvaco Corp.*, 319 F.3d 140, 148 (4th Cir. 2003).

- Alleged failure to fund benefits at time of plan spin-off in accordance with the terms of the plan: *Kinek* v. *Paramount Commc'ns, Inc. Pension Plan*, 22 F.3d 503, 512-13 (2d Cir. 1994).

- Alleged failure to provide health insurance coverage required by terms of the plan: *Heffner* v. *Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330 (11th Cir. 2006) (citing cases).

- Payment of death benefit to person alleged not to be the beneficiary designated in accordance with the plan: *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, No. 05-41851, 2007 U.S. App. LEXIS 19336, at *3-*8 (5th Cir. Aug. 15, 2007).

These cases demonstrate that § 502(a)(1)(B) authorizes the grant of monetary relief to participants who establish that they have not received the benefits to which they are entitled under the terms of the plan. The cases belie any

claim that ERISA must be amended to authorize a court to grant such relief.[12]

D. Because § 502(a)(1)(B) Offered Adequate Relief For Petitioner's Alleged Injury, Petitioner Was Not Entitled To Bring This Suit Under § 502(a)(2) Or (3).

As explained in Section III.C, petitioner had the right to seek the benefits he claimed by exercising his rights under ERISA § 503 and the Plan's benefit claim procedure, and if his claim was denied initially, and denied again on review, he had the right to sue under § 502(a)(1)(B). Because petitioner failed to do this, he gave up his right under ERISA to claim the benefits he believes he is due under the terms of the Plan.

The relief that petitioner seeks under § 502(a)(2) and (3) – an award equal to the benefits he claims to have lost – is the same relief that he could have sought under

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[12] Contrary to petitioner's assertion (Pet. Br. at 17-18), by drawing on the funds in an unallocated suspense account, a defined contribution plan can make a payment to a participant, or allocate funds to a participant's account, without reducing other participants' account balances. The funds in such suspense accounts come from a variety of sources, such as employer contributions made early in the year and forfeitures (typically created by participants who terminate employment before being fully vested). Such contributions and forfeitures can be allocated initially to a suspense account and then allocated to individual participants' accounts, or used to pay plan expenses, later in the year. *See* Rev. Rul. 80-155, 1980-1 C.B. 84 (permitting plan to hold unallocated funds until year end). Suspense accounts also can be created for a variety of other reasons. *See, e.g.*, Rev. Proc. 2006-27, App. A § .08, App. B. § 2.04(2)(a), 2006-1 C.B. 945. If a plan lacks sufficient unallocated funds to make a payment or allocation, the shortfall can be funded by future employer contributions or, if a breach of fiduciary duty caused the plan to incur a loss, by "restorative payments" that the plan collects from the responsible fiduciary pursuant to a separate action against the fiduciary under § 502(a)(2). *See* Rev. Rul. 2002-45, 2002-1 C.B. 116.

§ 502(a)(1)(B). The relief that petitioner seeks under § 502(a)(2) and (3) is not "appropriate" both because it is unnecessary and because it improperly converts a benefit claim into a fiduciary breach claim.

It is irrelevant that, by suing only under § 502(a)(2) and (3), petitioner gave up his right to sue under § 502(a)(1)(B). *See Jones* v. *American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1073 (11th Cir. 2004) ("The relief that the plaintiffs sought in their complaint was not relevant to this inquiry."). ERISA's remedial provisions allow a participant in an existing plan to make a claim for benefits under the terms of the plan only under § 502(a)(1)(B). Given ERISA's detailed remedial provisions, it defies common sense to think that Congress intended to allow a participant with a claim for benefits under the terms of the plan to evade the rules that Congress designed for such claims and to invoke instead rules designed for other types of claims. *Cf. Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965) ("A . . . rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.").

IV. Allowing Benefit Claim Suits To Be Brought Under § 502(a)(2) Or (3) Would Undermine ERISA's Benefit Claim Procedures.

A. Participants Could Circumvent The Exhaustion Requirement And The Abuse Of Discretion Standard Of Review.

If participants were allowed to recast benefit claims as fiduciary breach claims, and to pursue benefit claims outside of the procedures that ERISA prescribes for benefit claims, participants could readily circumvent the benefit claim process, including the exhaustion requirement and the abuse of discretion standard of review that apply to most benefit claims under ERISA.

1. Exhaustion.

ERISA's benefit claim procedures and the exhaustion requirement help to avoid unnecessary lawsuits and to foster efficient, nonadversarial dispute resolution and consistent decision-making by experienced and knowledgeable plan administrators. They also develop a record for a court to review in the event of litigation. *See Makar* v. *Heath Care Corp.*, 872 F.2d 80, 82-83 (4th Cir. 1989). If petitioner's position is upheld, benefit claimants will be able to circumvent plans' benefit claim procedures and deprive plans and plan participants of the benefit of the exhaustion requirement.

The courts of appeals agree that, in general, ERISA's remedial scheme implicitly requires that, in order to state a claim for benefits under § 502(a)(1)(B), a participant must first exhaust the plan's administrative remedies. *See Fallick* v. *Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 n.4 (6th Cir. 1998) (citing cases); *Kennedy* v. *Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594-95 (2d Cir. 1993).[13] The vast majority of benefit claims are resolved through this process. *See* 65 Fed. Reg. at 70,263, tbl. 4, ll. 1-6 (Nov. 21, 2000).

Although we do not know what issues would have been raised if petitioner had followed the Plan's benefit claim procedure, the Plan's administrators might have questioned whether petitioner's directions were (1) received by the Plan, (2) timely and unambiguous, (3) consistent with the Plan's requirements regarding the procedure for giving investment directions, or

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[13] Courts have excused failure to comply with the exhaustion requirement in some cases, such as where the court has found that resorting to the plan's procedures would be futile or that the plan had thwarted the proper operation of the claim procedures. *See, e.g., Paese* v. *Hartford Life & Accident Ins. Co.* 449 F.3d 435, 443-49 (2d Cir. 2006); *Lee* v. *California Butchers' Pension Trust Fund*, 154 F.3d 1075, 1079-81 (9th Cir. 1998).

(4) unlawful, inconsistent with Plan rules, or impossible or impractical to implement. Analogous issues arise under other plans, and plan administrators are typically well-positioned to resolve them.

2. Standard Of Review.

In *Bruch*, 489 U.S. at 115, the Court held that, if a plan administrator or other fiduciary has been granted discretion to construe the terms of the plan and a plan participant challenges the administrator or fiduciary's decision to deny a claim for benefits in an action under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), the court should apply the abuse of discretion standard in reviewing the benefit denial decision. The Court stated that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)).

The abuse of discretion standard of review assures the employer that if its plan grants discretion to a plan fiduciary to interpret the terms of the plan, the plan will be administered consistently and in accordance with the employer's purpose in establishing the plan. In *Black & Decker Disability Plan* v. *Nord*, the Court contrasted *statutory claims*, where benefit entitlement is based on uniform federal criteria, with *plan-based claims* under voluntary ERISA plans where employers have great leeway to design benefits:

> "[T]he validity of a claim to benefits under an ERISA plan," on the other hand, "is likely to turn," in large part, "on the interpretation of terms in the plan at issue." It is the Secretary of Labor's view that ERISA is best served by "presev[ing] the greatest flexibility possible for . . . operating claims processing systems

> consistent with the prudent administration of a plan." Deference is due that view.

538 U.S. 822, 833-34 (2003) (citations omitted).

If petitioner's position is upheld, benefit claimants will be able to circumvent plans' benefit claim procedures, and plans will lose the benefit of the abuse of discretion standard of review.

B. Courts Would Be Required To Review Benefit Claims Without An Administrative Record.

In general, a plan administrator's decision to deny a claim for benefits under the plan is reviewed solely on the basis of the record before the administrator. *See, e.g.*, *Liston* v. *UNUM Corp. Officer Severance Plan*, 330 F.3d 19, 23-25 (1st Cir. 2003) (citing cases). If claimants can evade plans' benefit claim procedures by recasting their benefit claims as fiduciary breach claims, courts will often have no record to review and will therefore be required to assume decision-making responsibilities that Congress assigned to plan administrators.

C. Plan Costs Would Increase, Harming Employees And Benefit Plans.

If participants with benefit claims believe that litigation will improve their prospects for recovery, plans' litigation costs will increase, and plans will be required to allocate a higher percentage of their resources to litigation and a smaller percentage to benefits. Mounting litigation expenses will also increase the pressure on fiduciaries to resolve benefit claims by settling on terms that are more favorable to claimants than the merits of the claims would justify – diverting plan assets to provide benefits that the plan was not designed to provide. Moreover, permitting benefit suits to be brought outside of ERISA's benefit claim procedures will, contrary to

Congress's intent, result in more benefit claim decisions being made in the first instance by judges and fewer by fiduciaries familiar with the operation, history, and purposes of the plan.

These consequences will discourage employers from establishing new benefit plans, encourage employers to terminate existing plans, and require plan fiduciaries to increase the percentage of plan resources devoted to legal fees and costs and to reduce the percentage devoted to providing benefits. *See Cooper* v. *IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) ("It is possible . . . for litigation about pension plans to make everyone worse off."), *cert. denied*, 127 S. Ct. 1143 (2007). This is hardly the vision that Congress had when it enacted ERISA.

CONCLUSION

For all of these reasons, as well as those set forth in the brief for respondents, *amicus curiae* respectfully urges the Court to affirm the decision below.

Respectfully submitted,

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